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January 26, 1989

Ms. Eileen McDunough
U.S. Department of Justice
Environmental Defense Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Colbert Landfill, Settlement with U.S. Air Force

Dear Ms. McDunough:

This letter is written to confirm my understanding of our telephone conversation which took place yesterday. In that conversation, you indicated that the United States had decided not to sign the proposed consent decree with the State of Washington to settle federal and state law claims against the Air Force regarding toxic contamination from the Colbert Landfill. You agreed to provide a more detailed explanation of the Department of Justice's rationale in taking this position. You also indicated that the policy behind this decision is related to the same policies expressed in negotiations over cleanup at the Hanford Nuclear Reservation.

I find this position to be extremely distressing, both in substance and in the context in which these issues are being raised. The contributions of the Air Force to the Colbert Landfill appear to predate RCRA and are as a generator who arranged for disposal at this site. See, § 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), RCW 70.105B.030. Given these factors, the nature of this case is very different from Hanford's proposed settlement which is under CERCLA and RCRA and also is a federal facility whose cleanup is guided by § 120 of CERCLA. 42 U.S.C. § 9620. Federal agencies are subject to the terms of CERCLA, procedurally and substantively to the same extent as non-governmental entities. Section 120(a)(1). Presumably this includes the requirements of Section 122(d)(1)(A) or (g)(4) providing for consent decrees. With the differences between Colbert and Hanford in mind, I do not see any reason why a consent decree would be inappropriate to resolve the Air Force's liability at the Colbert Landfill.

Even more concerning to me is the manner in which these objections have been raised by the Department of Justice. The idea of a separate IAG between the Air Force and EPA and a decree with the state was first discussed and agreed to between EPA, Ecology and Dave Thomson of DOJ in April of last year. Acting upon this agreed approach, we proposed a cash settlement with the Air Force for $1.45 million. This agreement in principle was reached on May 9, 1988, with the final language being agreed upon between Ecology and the Air Force shortly thereafter. This agreement, together with related settlements with Key Tronic and Spokane County were signed by the parties and forwarded to DOJ in early November. Yet no objections to the form of the proposed settlement had been raised until our conversation yesterday.

You expressed your regrets and apologies for the eleventh hour surfacing of these matters. Although I appreciate your personal efforts, I remain very disappointed and frustrated at the process utilized in formalizing our agreement. Because you indicated that the United States still wishes to commit $1.45 million towards the cleanup, I do not believe that there is any bad faith on your part. However, the best that can be said for the handling of this settlement is that the Air Force and Justice Department have been sloppy, and have failed to communicate with the affected divisions of the federal government. This case points out the need for the federal government to organize itself so as to simplify the process by which its agencies can fulfill their environmental responsibilities. I do not believe that Congress intended to allow the form of cleanup agreements to delay the urgent environmental action called for by CERCLA. I urge us to consider the ramifications of delaying remedial action at toxic waste sites (which all parties agree is needed) while lawyers endlessly debate questions of form and procedure.

I look forward to receiving your letter explaining the details of the Justice Department's position. I want to avoid litigation if possible since we have agreed on an appropriate settlement amount since last May. However, if an accommodation cannot be reached, the State of Washington will evaluate all its options, including suing for its past response costs, mixed funding provided under the related settlement with Key Tronic and Spokane County and any future liability. Obviously settlement at $1.45 million is in the interest of the United States and the State of Washington.

I hope that I have clearly expressed the state's position. I look forward to your letter next week and will

respond promptly. Please feel free to call me to discuss possible solutions or if you have any questions.

Very truly yours,

JEFFREY S. MYERS
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